IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

NO. 210

HOWARD HALL COMPANY, INC.
Appellant

VERSUS

UNITED STATES OF AMERICA AND
INTERSTATE COMMERCE COMMISSION,
Appellees

BRIEF OF APPELLANT

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I. THE OPINION OF THE COURT BELOW

The opinion in this case by the United States District Court for the Northern District of Alabama, composed of Circuit Judge McCord and District Judges Kennamer and Murphree rendered April 17, 1941, is reported under the style of *Howard Hall Company, Inc. v. United States of America et al,* 38 Fed. Supp. 556.

II. JURISDICTION

The jurisdiction of this court has been discussed in the statement as to jurisdiction filed in compliance with Rule 12. Plaintiff filed this suit under authority of Title 28,

Sections 46 and 47 of the United States Code Annotated, 36 Stat. 1149, 38 Stat. 32, seeking to set aside and annul the final order of the Interstate Commerce Commission under the Motor Carrier Act, Title 49, Sections 301 ff., 49 Stat. 543. Direct appeal from a final decree by a Three Judge Court to the Supreme Court of the United States is authorized by U. S. Code Annotated, Title 28, Section 345 (4), 43 Stat. 938. *United States v. Maher*, 307 U. S. 148, 83 L.ed. 1162, involved a similar appeal.

III. STATEMENT OF THE CASE

The appellant is a common carrier by motor vehicle of property in interstate commerce and as such filed an application for a certificate of convenience and necessity under Section 206 (a) of the Motor Carrier Act, generally referred to as the "grandfather" clause, U. S. Code Annotated, Title 49, Section 306 (a), 52 Stat. 1128. (See plaintiff's Exhibit 1, Record page 16.) In the application appellant claimed to have operated as a common carrier of commodities generally over irregular routes between points in Alabama and points in a number of other states prior to June 1, 1935 and continuously since that time. Two hearings were held by the Interstate Commerce Commission and evidence was introduced in support of the application (R. 9). The transcript of the evidence introduced before the Interstate Commerce Commission is not set out in the record before this court. The findings of the Interstate Commerce Commission as set out in its opinion are sufficient to raise the issues involved in this case. The Interstate Commerce Commission found that the appellant was a common carrier by motor vehicle and had been prior to June 1, 1935. The Commission further found that appellant was entitled to a certificate

as such and certain operating authority was granted but other parts of the application was denied. Motion for rehearing was filed and was denied by the Commission (R. 15).

The Interstate Commerce Commission in its decision found that the appellant prior to the grandfather date had transported 55 shipments to and from points located within a radius of 100 miles of Birmingham to points and places in other states, but limited the authority granted to a radius of ten miles of Birmingham and points in the other states (R. 10, 13). The appellant contends that such limitation was unjustified, arbitrary and capricious.

The Interstate Commerce Commission in its decision authorized the appellant to transport commodities generally to a limited territory and further granted authority to transport certain designated commodities between certain designated points in addition to the authority to transport commodities generally. This was based on evidence of actual operations between the said points (R. 13). Appellant contends that a common carrier can not be so limited as to the commodities it can transport.

Upon the order of the Interstate Commerce Commission denying appellant's motion for rehearing becoming final, appellant filed its complaint with the District Court for the Northern District of Alabama, Southern Division, seeking to restrain the enforcement of the order of the Interstate Commerce Commission insofar as it amounted to a denial of the application of the appellant and prayed that a Three Judge Court be assembled to hear the case. Evidence was introduced and the Court in its opinion substantially recited the facts as set out by the Interstate

Commerce Commission and affirmed the decision of the Interstate Commerce Commission. This appeal is from that decision.

IV. SPECIFICATIONS OF ERROR

(1) The District Court erred as a matter of law in affirming the decision of the Interstate Commerce Commission, which decision limited applicant's operating authority to; between Birmingham and points and places within ten miles thereof to points in other states, because the Commission in its decision specifically found that appellant had transported 55 shipments of freight to and from points within 100 miles of Birmingham, Alabama and points in other states prior to June 1, 1935; that as a matter of law under Section 206 (a) of the Motor Carrier Act, Title 49, Section 306, United States Code Annotated, 52 Stat. 1238, the Commission was bound to grant authority in accordance with the undisputed evidence of operations prior to June 1, 1935, to-wit: Between Birmingham, Alabama, and 100 mile radius thereof to points in the other states. Failure to set aside the order of the Commission which limited the operating authority of the appellant to a radius of ten miles of Birmingham was error.

(2) That the District Court erred as a matter of law in affirming the decision of the Interstate Commerce Commission wherein said Commission limited the operating rights of appellant under its application to the transportation of certain designated commodities to certain designated points for the reason that as a matter of law the Interstate Commerce Commission has no authority to place any limitations upon the operating rights of the

appellant with respect to the commodities transported because the Commission found that the appellant was a common carrier by motor vehicle. Under Section 206 (a) of the Motor Carrier Act, Title 49, Section 306, United States Code Annotated, 52 Stat. 1238, the Interstate Commerce Commission could only authorize operations over routes and territories and it is beyond its jurisdiction to limit applicant to certain designated commodities, as applicant was found to be a common carrier by motor vehicle. Failure to set aside and annul the order upon this ground was error.

V. SUMMARY OF ARGUMENT

POINT A. Under Section 206 (a) of the Motor Carrier Act, the Interstate Commerce Commission must grant a carrier a certificate of convenience and necessity upon its proof of bona fide operations prior to June 1, 1935, and the Interstate Commerce Commission is without jurisdiction arbitrarily to determine that a certain number of shipments are not sufficient to grant authority in that territory.

POINT B. Under Section 206 (a) of the Motor Carrier Act, the Interstate Commerce Commission is without jurisdiction to limit a common carrier by motor vehicle to designated commodities and must grant a certificate of convenience and necessity on proof of operations prior to June 1, 1935 over the routes and territories, regardless of the number of different general commodities transported.

VI. ARGUMENT AND AUTHORITIES

Point A

The Decision of the Commission Was Contrary to the Evidence

Section 206 (a) of the Motor Carrier Act provides that if any motor carrier "was in bona fide operation as a common carrier by motor vehicle on June 1, 1935 over the route or routes or within the territory for which application is made and has so operated since that time, *** the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operations, ***." The Interstate Commerce Commsision found as a fact that the appellant had transported at least 55 shipments to and from points located within 100 mile radius of Birmingham and outside of the 10 mile radius to points in other states prior to June 1, 1935. It further found that out of the whole 1,000 shipments transported during this period the large majority of them moved to and from Birmingham. It was then stated that the 55 shipments were too few to be considered in granting the authority sought (R. 10, 11). Section 206 (a) of the Motor Carrier Act does not place any requirements as to the number of shipments that must be transported before a certificate of convenience and necessity under the grandfather clause can be granted. The language of the Act is clear and unarabiguous. The Commission in it's opinion has exceeded the power granted to it by Congress by ignoring the operations conducted by the appellant prior to June 1, 1935. It is natural that a carrier would have more shipments to or from its headquarters than within a radius of 100 miles thereof, but the fact remains that the appellant did handle 55

shipments within that 100 mile radius. Appellant must have held himself out to operate as a common carrier throughout this territory. The Act provides with respect to operating authority "over the route or routes or *within the territory.*" Why should the Commission take the arbitrary figure of ten miles, in view of the finding that appellant had operated within the 100-mile radius?

There is a difference in the type of operation conducted by a regular route carrier and that by an irregular route carrier. The former, operating over fixed, designated routes and schedules, the latter over no fixed routes and on call and demand. Congress recognized this distinction in drafting the "grandfather" clause. This is indicated by the use of the phrase "over the route or routes or *within the territory.*" The appellant, an irregular route carrier furnishing service on call, had operated within the territory of 100 miles of Birmingham 55 times prior to June 1, 1935. The purpose of the "grandfather" clause in the Motor Carrier Act was to allow all motor carriers to continue to operate and do what they had been doing prior to June 1, 1935. To limit appellant to a ten-mile radius deprives him of that part of his business enjoyed on the "grandfather" date. It deprives him of a right granted to him by Congress and the Commission in its decision in this case has gone contrary to the intention of Congress and the clear provisions of the Motor Carrier Act. A property right has been taken without due process of law.

The Commission must consider all of the evidence before it and can not arbitrarily make a finding contrary to undisputed evidence. *Texas Pacific Railway Company v. Interstate Commerce Commission*, 162 U. S. 197. It is true that it has been held numerous times that the courts

will not disturb a finding of fact by the Commission, but it has also been held "the basic prerequisites of proof can be raised" in a court of law. *Rochester Telephone Corporation v. United States*, 307 U. S. 125, 140. The Commission has found the facts but has ignored the effect of their findings. They have failed to give effect to that provision of the "grandfather" clause "within the territory."

The Commission, in granting part of the application, gave the applicant the right to transport commodities between Birmingham and 10 miles and all points in the states of Georgia, North Carolina, South Carolina, Mississippi and part of Florida (R. 13). If on destination points it can give the applicant the right to go into such a wide territory when there was no showing of a movement to every point within the states of Georgia, Florida, Mississippi, etc., by what authority can they limit the applicant to Birmingham and a ten-mile radius thereof? If the Commission holds that by operations to several points in a territory it will include the whole territory, by the same reasoning it must grant authority to operate from Birmingham and a 100-mile radius thereof.

Point B

The Interstate Commerce Commission Is Without Jurisdiction to Limit A Common Carrier by Motor Vehicle to Certain Designated Commodities

The Commission found that the appellant was a *common carrier* by motor vehicle of general commodities between Birmingham and a radius of ten miles thereof and points in North Carolina, Georgia, Mississippi, South Carolina and part of Florida prior to June 1, 1935. The Commission further found that appellant was a

common carrier of paper from Birmingham to New Orleans, Louisiana, Chattanooga and Knoxville, Tennessee, and from Kingsport, Tennessee to Birmingham, Alabama; iron and steel articles from Canton, Ohio, to Birmingham; cloth from Alabama City, Alabama to Wheeling, West Virginia, matches from Wheeling, West Virginia to Chattanooga and Birmingham (R. 13). A certificate was granted accordingly.

The grant of a certificate in this form is contrary to the universal conception of a common carrier that has been held for generations. It is inconsistent to say that a carrier has held itself out to transport general commodities to a certain territory but has restricted its holding out to certain specific points and commodities in adjacent territory. Obviously, the scope of appellant's operation was limited by the shippers and not by the refusal of the appellant to transport all commodities offered to him. The Commission recognized that the Howard Hall Co. had transported other commodities to other territories but denied authority to operate on the ground that it had not transported these shipments with any degree of regularity (R. 13). The appellant is an irregular route carrier, furnishing transportation on demand, and it is natural that the shipments to the various points in the territory which the Commission denied would be less than in the territory nearer the carrier's headquarters. No carrier would hold itself out to haul iron and steel articles from Ohio to Alabama without seeking return hauls from Alabama to Ohio. The inconsistency in so limiting the applicant's certificate is pointed out by Judge Parker in the *Carolina Freight Carriers Corporation v. United States*, 38 Fed. Supp. 549, where it is said at page 553:

"There is nothing in this language or in the reason and spirit of the act which justifies the limiting of certificates granted common carriers under the grandfather clause to the precise commodities which they have theretofore hauled or in the case of carriers by irregular routes to the precise points that they have served in the territory over which they have operated. It is well settled that 'a common carrier is one who undertakes for hire or reward, to transport the goods of such as choose to employ him from place to place.' Dwight v. Brewster, 1 Pick., Mass., 50, 53, 11 Am. Dec. 133; Dobie on Bailments and Carriers, § 107; Hutchinson on Carriers, 3d ed., sec. 47."

The language used in Section 206 (a) of the Motor Carrier Act contains no reference to commodities and the limitation of common carriers to certain commodities is not authorized by this section. Operations over designated routes and "within the territory" is the language used. If common carriers are to be restricted to certain commodities then a new application for a certificate would be necessary if new commodities came into existence. Sections 207 and 208 of the Motor Carrier Act, dealing with certificates and their terms, do not mention commodities but deal with "operations," "service," "routes," "territory." If it had been the intention of Congress to grant the Interstate Commerce Commission the power of limiting common carriers to certain commodities, the provisions with respect thereto would have been written in Sections 206, 207 and 208 of the Motor Carrier Act.

Part 1 of the Transportation Act regulating railroads contains no limitation as to the commodities the railroads

may transport and the Interstate Commerce Commission has never attempted to exercise any such jurisdiction over railroads. (Compare Title 49, U. S. Code Annotated, Section 1, paragraph 18, with Section 206 (a) of the Motor Carrier Act.) The terminology is similar and no limitation with respect to commodities is contained in either. To allow common carriers by railroad unrestricted rights and to deny common carriers by motor vehicle over irregular routes the right to transport commodities generally is an unjust discrimination. It is a hardship on the public to say "there exists a peculiar type of common carrier by motor vehicle which can haul some shipments, but only a limited type of shipment, and it is the duty of public to find out which shipments the Interstate Commerce Commission has authorized the motor carrier to haul."

The Interstate Commerce Commission stated one of the reasons for denial of part of the application in this case as follows:

> "Common carriers which are expected to maintain regular service for the movement of freight in whatever quantities offered to and from all points on specified routes cannot operate economically and efficiently if other carriers are permitted to invade such routes for the sole purpose of handling the cream of the traffic available thereon in so-called irregular-route service." (R. 12)

This can not be a reason, unless the Motor Carrier Act so directs the Commission. There is no direction in Section 206 (a) which would authorize the Interstate Commerce Commission to discriminate against the irregular route carriers in favor of the regular route carriers. The

answer to this argument advanced by the Commission is well stated in the *Carolina Freight Carriers Corporation v. United States*, supra, where it is said at page 556:

> "But Congress has made no such distinction between common carriers by regular and those by irregular routes; and, for the Commission to make such distinction is to add to the act of Congress in favor of one class of carriers and against another. This the Commission cannot do. Ann Arbor R. Co. v. United States, 281 U. S. 658, 50 S. Ct. 444, 74 L. ed. 1098; Anchor Coal Co. v. United States, D. C., 25 F. 2nd 462."

Counsel for the appellee relied strongly on the case of *Loving v. United States*, 310 U. S. 609, 84 L.ed. 1387, affirming per curiam 32 Fed. Supp. 464. One essential difference between that case and the case at bar is that the Commission did not grant the applicant any rights as a common carrier of commodities generally but restricted the applicant to a few limited commodities to and from limited points. In the present case the Commission has tried to make the applicant into two types of a common carrier. One type is a common carrier of commodities generally in one locality and a very different type of a common carrier of limited commodities in another locality. Loving's operations seem to have been those of a contract carrier rather than a common carrier. He sought to serve a wide territory whereas the evidence showed he had only one truck on June 1, 1935 and transported few commodities. The appellant had eleven trucks and hauled many commodities (R. 9). The appellant held himself out as a common carrier throughout all territories and made no attempt to limit his operation.

McDonald v. Thompson, 305 U. S. 263, 83 L.ed. 164, relied on by opposing counsel in the District Court, has no bearing here. It was a suit by the Texas Railroad Commission to enjoin an illegal operation over the highways of Texas.

United States v. Maher, 307 U. S. 148, 83 L.ed. 1162, also relied on by counsel for the appellee, was a case where an irregular route motor carrier changed his operations to that of a regular route subsequent to the grandfather date and therefore is not in point on the issues presented here.

It was further urged by counsel for the appellees that the definition of a common carrier as contained in Section 203 (a), paragraph (14) [1] of the Motor Carrier Act, authorized the Interstate Commerce Commission to limit common carriers to certain commodities. The phraseology "any class or classes of property" is used and it is urged that this should be construed to mean any commodities and it is argued that if so construed the Interstate Commerce Commission under Section 206 (a) could then limit common carriers to any commodity. That is, they could limit a carrier to a certificate as a common carrier of cloth or of nails, etc. Had this been the intended meaning of the Motor Carrier Act, Con-

(1) The term "common carrier by motor vehicle" means any person which holds itself out to the general public to engage in the transportation by motor vehicle in interstate or foreign commerce of passengers or property of any class or classes thereof for compensation, whether over regular or irregular routes, except transportation by motor vehicle by an express company to the extent that such transportation has heretofore been subject to part I, to which extent such transportation shall continue to be considered to be and shall be regulated as transportation subject to part I. (As amended by Public Act No. 785, 76th Congress, Sec. 18(a), approved September 18, 1940 (Transportation Act of 1940).)

gress would have used different and definite language respecting the limitation, because this type of carrier would have been unique in the existing motor carrier field. At the time the Motor Carrier Act was passed, there were several different classes of carriers, such as petroleum carriers, carriers of household goods, carriers of motor cars, carriers of explosives, etc. By Section 204 (c) of the Motor Carrier Act, the Commission is authorized to classify carriers and this has been done by the Commission, 2 M.C.C. 703. Carriers have been classified in 17 groups, the first being designated "carriers of general freight." These groups are the "classes of carriers" that are referred to in Section 203 (a), paragraph (14), and not carriers of specified commodities of a general nature. The Interstate Commerce Commission found that the appellant was a common carrier of commodities generally and by this finding they will be bound to place this carrier in the classification "carriers of general freight" and therefore it can not be urged that the Commission has any authority to limit this carrier to any particular commodity.

CONCLUSION

WHEREFORE, it is respectfully submitted that the Interstate Commerce Commission erred in failing to grant the appellant authority to serve points within 100-mile radius of Birmingham, Alabama and points in other states in which it operates. The Interstate Commerce Commission exceeded their jurisdiction in limiting the authority of the appellant to certain designated commodities between certain points. It is further submitted that the order of the Interstate Commerce Commission should

be set aside and the cause remanded to the end that the Commission may pass upon the application of the plaintiff in accordance with the provisions of the Motor Carrier Act.

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